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No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Legal issues concerning the provision of primary and secondary education are of singular fiscal and social importance to *amici*. Public education is the largest expenditure of state and local governments. The judgment of the court of appeals seriously disrupts the planning and implementation of special education programs for the millions of disabled children served by public schools. By ruling that respondent can seek reimbursement for private school tuition when his parents did not even notify, much less cooperate with, public school special education experts as required by IDEA, the holding below will divert funds from achieving the statute's purpose—effective special education of millions of disabled children.

As this Court has repeatedly noted, it is Congress' intent that "IDEA's promise of a 'free appropriate education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993). Because of the importance to *amici* and their members of ensuring that Congress' goals for the education of the nation's

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[1] Counsel for the parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

disabled children are honored, *amici* submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

I. The language and overall structure of 20 U.S.C. § 1412 is purposeful and clear, and carefully define the States' obligations to disabled children. To be eligible for federal funding under IDEA, States must satisfy particular requirements set forth in subsection 1412(a). Among many other enumerated obligations, States must provide a "free appropriate public education" ("FAPE") to all disabled children enrolled in public school. 20 U.S.C. § 1412(a)(1).

Paragraph 1412(a)(10) addresses directly the obligations that a State owes to "[c]hildren in private schools." Subparagraph 1412(a)(10)(A) establishes the general rule, subject to certain defined exceptions, that disabled children "enrolled in private school by their parents," are entitled to receive from the State a more limited collection of services—not the equivalent of a FAPE—that are specifically defined in the subparagraph.

One defined exception to that general rule arises, under subparagraph 1412(a)(10)(B), where the State "place[s]" or "refer[s]" the student to private school. In that event, under the express language of clause (i), the State must provide "an individualized education program, at no cost to the[] parents." Accordingly, where the State places the child in the private school, it is obligated to provide a FAPE and the full gamut of rights and procedures under the statute, including the cost of the education.

A second exception to the rule of reduced obligations owed to children in private schools is

provided in subparagraph 1412(a)(10)(C), which comes into play where the parents desire a particular private placement and the school district does not concur. By its terms, in clause (i), the statute states that there is no obligation on the State to "pay for the cost of education" where the State made a FAPE "available to the child and the parents elected to place the child in such private school" anyway. In clause (ii), the statute states that tuition reimbursement may be available to parents "*who previously received special education and related services under the authority of a public agency*" (emphasis added), where certain other requirements, including the inappropriateness of the IEP provided, are met.

As the court below concedes, Pet. App. 16a, the only reasonable reading of the "who previously received" language of § 1412(a)(10)(C)(ii) is as a threshold condition to the award of tuition reimbursement under subparagraph (C). To read it in any other way makes that language entirely without consequence.

Moreover, the language surrounding § 1412(a)(10)(C)(ii) also supports this plain meaning. Later within the same subparagraph, the statute speaks of certain limits on reimbursement claims which reflect the premise that the child was pursuing special education services in public school prior to his removal. The recurrent nature of this language, all reflecting this same premise, makes clear that its use was not accidental.

The court below does not quarrel with this plain meaning of the statute as excluding reimbursement under subparagraph 1412(a)(10)(C), but nevertheless

justifies tuition reimbursement under very general language appearing in subparagraph 1415(i)(2)(C). That language authorizes a court to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). To say that it allows tuition reimbursement for children in private schools which cannot be justified under paragraph 1412(a)(10) would sunder the logical structure of the statute, which confers funding benefits in exchange for acceptance of defined obligations. Paragraph 1412(a)(10) carefully defines the States' obligations to parents of students in private schools. The Ninth Circuit's ruling allows the imposition of any other obligations that a district judge may deem "appropriate," contrary to the express limitations Congress placed on tuition reimbursement claims in 1997.

II. Reading paragraph 1412(a)(10) in a manner consistent with its language and structure does not lead to absurd results. The Ninth Circuit's concern that respondent and those like him will be forced to "indefinitely" acquiesce to an inappropriate placement finds no support in the record, and runs contrary to this Court's consistent teachings that we should assume public school officials act appropriately absent evidence to the contrary. The similar concern that public schools could purposely deny IDEA eligibility to those like respondent, and thereby deny them *both* a FAPE *and* a tuition reimbursement claim, is illusory. Congress enacted comprehensive procedural devices in the IDEA to ensure that all eligible children are properly identified through a cooperative and objective process. These statutory procedures, and not a hasty unilateral withdrawal from the public school and

appeal to the judiciary's equitable powers, is how Congress' envisioned these concerns would be addressed.

ARGUMENT

I. UNDER THE STATUTE'S PLAIN LANGUAGE AND STRUCTURE, PARENTS WHO UNILATERALLY PLACE CHILDREN IN PRIVATE SCHOOL HAVE A RIGHT TO TUITION REIMBURSEMENT ONLY WHERE THE CHILD HAS PREVIOUSLY RECEIVED SPECIAL EDUCATION SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY.

"Statutory construction . . . is a holistic endeavor." *Smith v. United States*, 508 U.S. 223, 233 (1993) (internal quotation marks omitted). "'[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law.'" *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)) (second brackets and ellipse in original). The language and overall structure of 20 U.S.C. § 1412 are purposeful and clear, and carefully define the States' obligations to disabled children in public and private schools.

A. Section 1412(a) Defines the Obligations of States Receiving IDEA Funding, Including, in Section 1412(a)(10), Their Obligations Concerning Children Enrolled in Private Schools.

Section 1412 of IDEA is aptly titled "State eligibility." Subsection (a) of that provision says that

a "State is eligible for [federal IDEA funds] if [it] . . . provides assurances to the Secretary [of Education]" that it has adequate "policies and procedures" with respect to twenty-five separate issues (§§ 1412(a)-(y)). These policies and procedures must be satisfied by a State's treatment of children with disabilities residing within its borders.

Most of the twenty-five issues concern children enrolled in *public* schools. For instance, a disabled child enrolled in public school in a state that receives IDEA funds has an individual right to a "free appropriate public education" ("FAPE"). *See* 20 U.S.C. § 1412(a)(1). This right is ensured through the use of an Individualized Education Program ("IEP"). *See id*. § 1412(a)(4); 34 C.F.R. § 300.320. The public agency "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate" in the formulation of the IEP. 34 C.F.R. §§ 300.322, 300.501. If not satisfied, those parents have numerous "procedural safeguards," including independent administrative and judicial review of the IEP. *See* 20 U.S.C. § 1412(a)(6); 34 C.F.R. §§ 300.500 *et seq*.

One of the twenty-five paragraphs of § 1412(a) concerns *private* school students. Paragraph 1412(a)(10) addresses the States' special obligations to "[c]hildren in private schools." This provision exhaustively addresses the required "policies and procedures" States owe to private school students—no matter how, when and why they were enrolled there.

1. *Under Subparagraph 1412(a)(10)(A), States Generally Owe a Reduced Set of Obligations, Not Including a FAPE, To Students Enrolled In Private Schools.*

Unlike the broad entitlement given to public school students (*see supra* § I.A.), in general "children enrolled in private school by their parents" have *no individual right* to a "free appropriate public education." *Florence County,* 510 U.S. at 13. They are entitled only to more limited, expressly defined "services" from their public school district, *see* 20 U.S.C. § 1412(a)(10)(A), and have no "individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a).

The obligations owed by States to disabled students placed in private schools by their parents are discussed at length in the statute. *First*, each public agency must locate, identify, and evaluate all private school children residing in its district. 20 U.S.C. § 1412(a)(10)(A)(ii) (the "child-find requirement"); 34 C.F.R. § 300.131. *Second*, the public agency must create a "services plan" of special education and related services and reasonably accommodate students to participate in that plan. 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. §§, 300.137-38. *Third*, the agency must consult with private school representatives and parents in the development of the services plan. 20 U.S.C. § 1412(a)(10)(A)(iii); 34 C.F.R.§ 76.652(b)-(c). *Fourth*, when the district is making the final decisions with respect to the student's services plan, parents need only be provided an "opportunity to express their views," 34

C.F.R. § 76.652(c), rather than a full due process hearing. *Id*. § 300.140(a).[2]

Quite importantly, in addition, States need only provide these students with services that can be purchased with a proportionate amount of the federal funds that they receive under IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)(I)-(II); 34 C.F.R. § 300.133. The intent of § 1412(a)(10) has been consistently articulated by the courts of appeals: IDEA does "not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students." *K.R. v. Anderson Cmty. Sch. Corp*., 125 F.3d 1017, 1018 (7th Cir. 1997).

2. *Under Subparagraph 1412(a)(10)(B), The State Must Provide a FAPE, and Thus Pay the Costs of Private Education, Where The Child Is Placed In The Private School At The Initiative Of The Public Agency.*

Sometimes a public school district will "place[]" or "refer[]" a disabled child to a private school because it deems such a placement the best "means of carrying out the requirements" of the IDEA for that particular child. When it does so, the school district still has the responsibility of ensuring that IDEA standards are upheld as if the child were in public school. 20 U.S.C. § 1412(a)(10)(B)(ii) (referring public agency must ensure that the private school "meet[s] standards that apply to [public] educational agencies"); *see also*

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[2] A parent may request a due process hearing, but only to challenge a public agency's satisfaction of its "child find" obligations. 34 C.F.R. § 300.140(b).

34 C.F.R. § 300.2(c). These children "have all the rights the children would have if served by [public] agencies," 20 U.S.C. § 1412(a)(10)(B)(ii), and their private placement comes "at no cost to their parents." *Id*. § 1412(a)(10)(B)(i). Thus, when the public agency directs the enrollment of a child in private school, it is responsible for the costs, and oversight, of the child's education.

3. *Under Subparagraph 1412(a)(10)(C), The State Can Be Required to Pay The Costs of Private Education Even Where The Public Agency Disputes The Placement, But Only Where The Limitations and Conditions of That Subparagraph Are Satisfied.*

Parents and public school districts do not always agree on a disabled child's placement, and the IDEA is explicit in defining the situations in which the State will be responsible for private school tuition which it did not suggest or agree with. That subject is addressed at some length in subparagraph 1412(a)(10)(C). Clause (ii) within that subparagraph provides:

> If parents of a child with a disability, *who previously received special education and related services under the authority of a public agency,* enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free

> appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). On its face, this language appears to create a limited opportunity for parents of children unilaterally placed in private schools to secure private school tuition reimbursement, even where the State opposes the private placement. That opportunity appears to apply only to parents whose child "previously received special education and related services" from the public school, where it is determined by a court or hearing officer that the public school failed to make "a FAPE available . . . in a timely manner prior to" enrollment in the private school.

As the Ninth Circuit acknowledged, it is unreasonable to read this language in any other way. *See* Pet. App. 16a. To read the provision otherwise, and permit reimbursement to parents who have unilaterally placed their child in private school without previously sending their child to public school, would give the "previously received" clause *no meaning at all*. This Court has long been reluctant to read statutes in a way that makes certain language "mere surplusage." *See South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 510 n.22 (1986) (a "statute should be interpreted so as not to render one part inoperative") (internal quotation marks omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

Other language within subparagraph (C) supports the view that the "previously received" clause

establishes a condition to securing tuition reimbursement. *First*, Congress' use of the past tense throughout that provision demonstrates that reimbursement depends on the child's previous public placement. *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1993) ("Congress' use of a verb tense is significant in construing statutes."); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 59 (1987) (same); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (same). Subparagraph (C)(i) states that reimbursement is not available when the public agency

> *made* a free appropriate public education available to the child and the parents *elected* to place the child in [a] private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). Similarly, subparagraph (C)(ii) makes reimbursement available when the public agency

> *had not made* a free appropriate public education available to the child in a timely manner *prior* to [their] enrollment [in a private school].

Id. § 1412(a)(10)(C)(ii) (emphasis added).

By using the operative verbs in the past and past perfect tenses, Congress indicated that the *existence* of the State's obligation to provide a FAPE—as well as its subsequent failure to do so—is a condition precedent to reimbursement for private school tuition. Because the State is not generally obligated to provide a FAPE to children in private schools, 20 U.S.C. § 1412(a)(10)(A); *Florence County*, 510 U.S. at 13-14, it necessarily follows that parents of children

unilaterally enrolled in private schools are not entitled to reimbursement.[3]

Second, IDEA's "limitations" on reimbursement support this conclusion. While subparagraph (C)(ii) authorizes reimbursement for certain privately-placed children, the next clause (iii) states that "[t]he cost of reimbursement described in clause (ii) may be reduced or denied . . . if":

> (I) . . . at the most recent *IEP meeting* that the parents attended *prior to removal of the child from the public school*, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and intent to enroll their child in a private school at public expense; or . . . 10 business days . . . *prior to the removal of the child from the public school*, the parents did not give written notice to the public agency . . .; [or]
>
> (II) . . . *prior to the parents' removal of the child from the public school*, the public agency informed the parents . . . of its intent to

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[3] The applicable regulations confirm this construction. The section dealing with private school reimbursement is entitled "Children With Disabilities Enrolled By Their Parents in Private School *When [A] FAPE Is At Issue*." 34 C.F.R. § 300.148 (emphasis added). Because privately placed students are not entitled to either an IEP or the FAPE which the IEP is designed to achieve, *see Florence County*, 510 U.S. at 13, these regulations support the view that a parent who enrolls the child in private school before a public agency determines that the child is entitled to special education is not entitled to tuition reimbursement.

> evaluate the child . . . , but the parents did not make the child available for such evaluation.

20 U.S.C. § 1412(a)(10)(C)(iii)(I)-(II) (emphases added). This limitation applies to all reimbursement claims "described in clause (ii)," and read together with that clause, reinforces the conclusion that prior enrollment in public school is a precondition for tuition reimbursement. Specifically, an IEP meeting must occur, and notice of parental discontent must be given, "*prior to removal of the child from public school*" and before the parents make good on their "*intent to enroll their child in private school*." The upshot of this language leaves little room for debate: previous public school enrollment was viewed by Congress as a precondition for tuition reimbursement.

A claim for tuition reimbursement for such children is a narrow exception to the general rule of non-reimbursement where a parent unilaterally and voluntary places their child in private school. Strictly construing the exception to the general rule of non-reimbursement is the "'only . . . permissible meaning[] [of the provision that] produces a substantive effect that is compatible with the rest of the law.'" *Smith v. United States*, 508 U.S. 223, 233 (1993) (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988)).

B. If Reimbursement Cannot Be Justified Under Section 1412(a)(10), As The Respondent And the Court Below Conceded, It Cannot Be Justified Under Section 1415.

Respondent in this case has conceded that "he does not meet the statutory requirements under 20

U.S.C. § 1412(a)(1)(C), because he had not 'previously received special education and related services'" in public school. Pet. App. 11a. The district court agreed with that conclusion, *id*., as did the Ninth Circuit. *Id*. 16a ("Because T.A. never received special education and related services [from the petitioner], § 1412(a)(1)(C) does not apply in this case."). Instead, the Ninth Circuit held that "reimbursement may be sought . . . if at all, only under principles of equity pursuant to § 1415(i)(2)(C)." *Id*.

Section 1415 requires States to guarantee parents certain "procedural safeguards with respect to the provision of a free appropriate public education." 20 U.S.C. § 1415(a). Among them are the "right to bring a civil action" by "[a]ny party aggrieved by the findings and decision made" in a due process hearing. *Id*. § 1415(i)(2)(A). In such an action, the court is directed to "grant such relief as [it] determines is appropriate." *Id*. § 1415(i)(2)(C)(iii). The Ninth Circuit grounded respondent's request for tuition reimbursement in this last phrase.

To allow this general provision to govern reimbursement requests by parents who unilaterally enroll their children in private schools prior to receiving special education in public school would expand the States' statutory obligations beyond those defined by Paragraph 1412(a)(10). IDEA contains two, carefully-defined exceptions to the general rule that States are not required to pay tuition for disabled students enrolled in private school. *See infra* §§ I.A.2. & 3. (discussing 20 U.S.C. § 1412(a)(10)(B) and (C)). The Ninth Circuit's reasoning, however, would create a *third* category of private school students entitled to tuition reimbursement—students who never received special

education services in the public school, but who may still win public funding by seeking and then disputing the adequacy of an IEP created by the public school district.

Subparagraph 1415(i)(2)(C) would become the broadest of all the exceptions. Parents who have *always* sent their children to private school could simply contact their local public school, request an IEP, reject and litigate the propriety of that IEP, all in the hope that a court will grant them tuition reimbursement from the public school under "the principles of equity." The generally-worded text of subparagraph 1415(i)(2)(C) cannot justify this result. "'Where Congress explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied.'" *United States v. Smith*, 499 U.S. 160, 167 (1981) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

The disconnect between this "equitable" exception and the rest of § 1412(a)(10) would also sanction perverse incentives. Subparagraph 1412(a)(10)(C) makes time limits on withdrawal from the public school and cooperative interactions with school officials relevant to (or even dispositive of) a reimbursement claim when the private placement is without the consent of the public school. *See supra* § I.A.3. Parents who choose private school for their children at the outset would be naturally exempt from these provisions and, consequently, could seek tuition reimbursement more easily than parents who follow the IDEA scheme in good faith. Bypassing the system would be rewarded over working within the system to achieve IDEA's core goal of "normally" educating disabled children "in the regular public schools." *Florence County*, 510 U.S. at 12.

II. READING SECTION 1412(a)(10) IN A MANNER CONSISTENT WITH ITS LANGUAGE AND STRUCTURE DOES NOT LEAD TO ABSURD RESULTS.

The Ninth Circuit adopted a strained reading of Section 1415 because, in its view, denying reimbursement here would lead to the "absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate public school, no matter how uncooperative the school district and no matter how inappropriate the special education." Pet. App. 15a-16a. Not only is there no evidence of this problem in respondent's case, there is likewise no evidence that this sort of situation is anything but exceedingly rare.

Predicting this result on mere supposition, moreover, reflects a cynical contempt for the expertise of public school special education specialists that is directly contrary to this Court's teachings. As *Schaffer v. Weast* made clear, this Court cannot "assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals." 546 U.S. 49, 59 (2006); *id*. at 62-63 (Stevens, J., concurring) (joining opinion of the Court "because I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute").

The Ninth Circuit also feared that a plain reading of § 1412(a)(10) would shut-out those students who "the school district declined to recognize . . . as

disabled." Pet. App. 16a. Those students, the court feared, would "*never* receive special education in public school and therefore would *never* be eligible for reimbursement." *Id*. (emphasis in original). A disagreement among a parent and a school district on a disability determination, however, is thoroughly addressed by the IDEA. Parents have the right to seek their own independent educational evaluation, 20 U.S.C. § 1415(b)(1), to present the disagreement among the evaluators at a due process hearing, *id*. § 1415(b)(7), and receive judicial review of the outcome, *id*. § 1415(i)(2). These procedural rights mitigate the unfounded fear that a student will be left without neither a FAPE nor a reimbursement claim simply because the parties disagree on the existence (or identification) of his or her particular disability. It certainly does not follow that a parent having this disagreement can forego the procedural safeguards set forth in the Act, dodge the limitations that accompany those safeguards, remove their child from private school and appeal to the unbounded judicial discretion of § 1415 to claim full reimbursement for their child's private education. IDEA is much too detailed to sanction this *ad hoc* result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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